SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 151

RYAN STEVEDORING CO., INC.,

Petitioner,

v.

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Statement of the Case

In 1949, a longshoreman named Palazzolo, in the employment of Ryan, a stevedoring company which is the petitioner here, was injured while he and other employees of Ryan were discharging a cargo of rolls of paper pulp aboard the S. S. Canton Victory, then lying at a pier in Brooklyn, N. Y.

The respondent, Pan-Atlantic, was the bareboat charterer of the vessel and, therefore, will be treated herein as the owner of the vessel.

Palazzolo sued Pan-Atlantic on the sole and exclusive theory that the stowage of rolls was improper. If proved, this would necessarily make the vessel unseaworthy as to her stow.

Ryan had actually stowed this cargo at Georgetown, S. C., so the case is one where the same stevedore both created the stow at one port and discharged the same cargo, which remained undisturbed in the interim, at another port.

Palazzolo proved to the satisfaction of a jury that at Georgetown, S. C., Ryan had failed to insert under the bottom rolls adequate pieces of wood or chocks which would prevent the rolls from coming loose, rolling uncontrolled at the time when the cargo was being discharged and striking Palazzolo. Thus, the vessel was found unseaworthy because of the improper stow. The jury fixed his damage at $75,000.

The Court of Appeals for the Second Circuit unanimously affirmed Palazzolo's judgment against Pan-Atlantic, on the ground that the latter had a non-delegable duty to provide him with a safe place in which to work and a seaworthy vessel. The Court decided that while indisputably Ryan had affirmatively created the stow which the jury had found improper and unseaworthy, that fact was no defense against Palazzolo, so far as Pan-Atlantic was concerned, because of the absolute and non-delegable character of the duty imposed by the law on shipowners.

Upon the affirmance, Palazzolo's judgment was paid and, thus, the issue between the injured longshoreman and the shipowner has been finally resolved. All of his legal rights have been fully satisfied and the present controversy is a matter of no interest to the injured man.

While Palazzolo's action was pending against Pan-Atlantic, the latter sued Ryan (using procedurally Rule 14

of the Federal Rules of Civil Procedure) to procure indemnity for any damage Pan-Atlantic might sustain as the result of Palazzolo's action, if his recovery was based on the fact that the stowage at Georgetown, created by Ryan, was improper. One of the theories upon which this claim was based was that if Ryan's breach of its implied warranty to do a reasonably proper job of stowing the cargo caused the vessel to become unseaworthy and thus created a species of liability without real fault on the part of Pan-Atlantic vis-a-vis Palazzolo, then Pan-Atlantic should have indemnity against Ryan for breaching its contract and causing Pan-Atlantic's obligation to come into being.

Although the question of indemnity between shipowner and stevedore is most commonly covered by contract provisions, Pan-Atlantic was compelled to seek common law indemnity because the contractual arrangements between Pan-Atlantic and Ryan were informal and unusual (Record, 24, 25, 268-272). They consisted of two memoranda and two letters referring only to the price Ryan would receive for stevedoring vessels operating in the coastwise service of Pan-Atlantic (Record, 26-31). This rare situation existed because Pan-Atlantic and Ryan were wholly owned subsidiary corporations of a common parent, namely, Waterman Steamship Corporation, which was "servicing" the vessel for Pan-Atlantic in the Port of New York at the time of the accident (Record, 21, 35-41).

Ryan defended against Pan-Atlantic's claim for indemnity on the ground that Ryan, as Palazzolo's employer, had obtained insurance to cover its obligations *to Palazzolo* under the U. S. Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. 901, *et seq.*) and thereby became legally incapable of any obligation of any description for anything *to Pan-Atlantic* (Record, 15, 16).

Ryan tested the validity of that affirmative defense, which lies at the heart of the petitioner's position here, by

motion for summary judgment (Record, 21-31) which was denied by the District Judge (Record, 31-33). The threadbare argument was repeated to the Trial Judge (Brief for Petitioner, 5) and the Court of Appeals for the second Circuit (Brief for Petitioner, 17). Neither Court would dignify this desperate "defense" even by discussion in their opinions (111 F. Supp. 505; 211 F. 2d 277).

This case no longer presents any problem of Ryan's compensation insurance carrier as such, although that carrier, American Mutual Liability Insurance Co., may well have another insured obligation which it seeks to avoid. The compensation carrier had a right under the law (33 U.S.C.A. 933) to recoup from Palazzolo's recovery what it had previously spent for medical expenses and compensation paid to Palazzolo. Such a judgment in the amount of $12,797.36 was entered in favor of the insurance company (Record, 319, 320) and was fully paid upon the affirmance of Palazzolo's judgment by the Court of Appeals.

There was one basic issue of fact common to the separate disputes between Palazzolo and Pan-Atlantic and between Pan-Atlantic and Ryan, namely, whether the stow created by Ryan at Georgetown was reasonably safe. All claims were tried at the same time, Palazzolo's being tried to a jury and Pan-Atlantic's claim for indemnity against Ryan being left for decision by the Trial Court, if Palazzolo received a judgment. There was no dispute of fact between Ryan and Pan-Atlantic, the facts were stipulated by counsel (Record, 268-273) and Ryan did not call any witnesses (Record, 273).

The Trial Court denied the claim for indemnity because the vessel had a second mate aboard, watching the cargo being stowed during four of the twenty hours the vessel was being loaded at Georgetown and, in effect, the Trial Court held it was the vessel owner's obligation *as to the stevedoring corporation* (not an injured longshoreman) to

see that the stevedore did that good, workmanlike job which it was paid to do (Record, 318-319). Actually, the uncontradicted testimony of the mate (quoted by the petitioner in fragmentary fashion at Brief for Petitioner, 6 and 7) demonstrated that all five hatches were worked during loading at Georgetown (Record, 217); the mate on watch would not spend all of his time in any particular hold and would be all over the vessel (Record, 234); the mate had no authority to direct any of Ryan's men in the manner of loading the cargo and did not supervise the detail of the stow (Record, 234, 235); there were proper chocks on the vessel and the dock (Record, 235); the mate had seen Ryan's men use proper chocks aboard the vessel from time to time during the loading of this cargo but it would not be possible for any mate who did not remain continuously in one hold to know whether, in fact, all of the rolls would be properly chocked, or if, indeed, they were chocked at all (Record, 236). All of the witnesses on the subject were in harmony that once the bottom layer has been fully stowed, it is physically impossible for anyone to tell whether the rolls have been chocked or secured, or, if they have been secured, the nature of the material used (Record 77, 236, 237, 245).

The Court of Appeals reversed the erroneous decision of the District Court, referring to the admitted fact that "the improper stowage (was) the primary and active cause of the accident" (Record, 326). Indeed, it was the *only* cause of the accident ever assigned by Palazzolo and the only cause which could possibly sustain Palazzolo's recovery. The Court said that "Ryan was obligated by implied contract to perform the work in a reasonably safe manner. This duty Ryan breached; * * *" (Record, 327). The Brief for Petitioner does not challenge either statement.

Ryan's petition for a writ of certiorari was granted by this Court on October 14, 1954.

Summary of Argument

I. While a right of indemnity may arise under divers situations, we need be concerned here only with indemnity arising from contract. In the light of the history preceding consideration of the problem by Congress and the entire Congressional Record, the U. S. Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. 901, *et seq.*) is strictly a law of workmen's compensation, leaving totally unaffected a contractor's obligations to those other than his employees. 33 U.S.C.A. 905 applies only to those sued as employers and in suits by employees, or those who claim through employees. The substantive rights of the parties cannot be obscured by procedural matters.

II. The right asserted here for indemnity is not maritime in character. The right has existed for at least half a century and no legislation is required to create it. No reason has been assigned to justify judicial action exempting stevedores from the full impact of existing law, and there are cogent affirmative reasons why stevedores should be held to the same responsibility as all other contractors. The petitioner's discussion of admiralty jurisdiction is not supported by the facts or the law.

III. The Trial Court intermingled negligence and unseaworthiness in its charge to the jury and then separated the ideas in deciding Pan-Atlantic's rights against Ryan. The Court of Appeals for the Second Circuit rectified this injustice, and in so doing did not make findings of fact differing from the Trial Court's. The Trial Court ignored the contractual relation of Pan-Atlantic and Ryan; the Court of Appeals applied the correct rule of law to the admitted facts.

POINT I

Ryan's compliance with the United States Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A., § 901, *et seq.*, does not bar Pan-Atlantic's claim for indemnity against Ryan.

A right of indemnity may arise from (a) tort, (b) quasi-contract, (c) express contract, or (d) implied contract. It is not the purpose of the respondent's presentation to discuss academically the possible effect of the U. S. Longshoremen's and Harbor Workers' Compensation Act on every possible right of indemnity, under all possible contingencies, and arising from every possible legal relationship. Since one ground assigned by the Court of Appeals for the Second Circuit for granting indemnity to Pan-Atlantic was the law of implied contract (Record, 327), and since the issue seems clearest to respondent's counsel when viewed against that limited backdrop, the affirmative discussion of this point will proceed fundamentally to consider the effect of the Act upon the implied contractual rights of this shipowner against this stevedore.

While the arrangements were unusual in form for the reasons indicated hereinbefore, at page 3, there was admittedly a written contract between Pan-Atlantic and Ryan (Record, 24-31; 268-272). The case does not lie in the realm of quasi-contract where, in order to achieve an equitable result, the law creates the legal fiction that a contract exists when, in fact, none does. The law of implied contract requires that there be read into an existing arrangement whatever terms necessarily and sensibly flow from the agreement in order to make the undertaking

rational and complete.[1] The written agreement in this case being silent on the subject, the law simply implies that Ryan would do a good job. Ryan breached the contract and Pan-Atlantic has suffered damage. May Ryan breach its contract with impunity, pointing to the Act for exculpation?

The main issue presented by the petition being the general scope of 33 U.S.C.A. 901, *et seq.*, and the particular compass of Section 905, the question may be stated thus:

> "When a stevedore fulfills his obligations *to his employee* by procuring compensation, does this federal law exonerate the stevedore from breaching his contract with a *shipowner?*"

In treating of the statute, one of the basic errors of the petitioner is its failure to appreciate the exact nature of

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[1] It is appreciated that a contract to stevedore cargo is maritime in character and, as to forum, may be presented to an admiralty court. But the rules of implied contract do not differ in admiralty. For example, in *Sacramento Navigation Company* v. *Salz*, 273 U. S. 326, damages arising out of a bill of affreightment were asserted in an admiralty court and the scope of a bill of lading was involved. The court said:

> "But a contract includes not only the promises set forth in express words, but, in addition, all such implied provisions as are indispensable to effectuate the intention of the parties and as arise from the language of the contract and the circumstances under which it was made (3 Williston, Contr. § 1293; Brodie v. Cardiff Corp. (1919) A. C. 337, 358—H. L.) * * *."

See, also, on the general question, Mr. Justice Holmes' opinion in *Barnes* v. *Alexander*, 232 U. S. 117, where it was written,

> "We start, however, with the principle that an informal business transaction should be construed as adopting whatever form consistent with the facts is most fitted to reach the result seemingly desired."

And *North German Lloyd* v. *Guaranty Trust Co.*, 244 U. S. 12, 24; *Watson Bros. Transp. Co.* v. *Jaffa*, 143 F. 2d 340, 348 (C. A., 8th Cir.); *Brooker Engr. Co.* v. *Grand River Dam Authority*, 144 F. 2d 708, 710 (C. A., 10th Cir.); *Nevada Half Moon Mining Co.* v. *Combined Metals R. Co.*, 176 F. 2d 73 (C. A., 10th Cir.), and *Williston on Contracts*, Vol. 5, pp. 3681-3685.

the problem which Congress there solved. Congress dealt entirely with an employer-employee relation, compensation rights and obligations *inter se*, and nothing more. Workmen's Compensation Laws of this type remove the *employee's* claim against his *employer* entirely from the realm of negligence, where the employer could defend on the grounds of negligence of a fellow servant, assumption of risk and contributory negligence. In common law actions the employee's rights and the employer's responsibilities were uncertain, both as to liability and *quantum* of damage. Compensation laws render the employer's liability to his employee absolute without regard to fault and in return therefor the amount due the employee is fixed and certain as prescribed by the law.

In 1916 this Court held that the New York State Workmen's Compensation Law could not be applied to the death of a longshoreman occurring aboard a vessel in the Port of New York. Such legislation would modify general maritime law, interfere with uniformity and, therefore, is repugnant to the Constitutional grant of exclusive power to Congress in the maritime field. *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205.

During the year after the *Jensen* decision, Congress attempted to bring longshoremen under State Compensation Laws by amending the Judiciary Act to extend the admiralty and maritime jurisdiction of the United States district courts to "claimants (asserting) the rights and remedies under the Workmen's Compensation Law of any state" (Oct. 6, 1917, Chapter 97, 40 Stat. at L. 395, Comp. Stat., § 991 (3)). Because, in effect, this statute was a delegation of exclusive Congressional authority and incorporated by reference into Federal law the various and, perhaps, discordant state statutes, its unconstitutionality was adjudged in *Knickerbocker Ice Company* v. *Stewart*, 253 U. S. 149 (1919).

Congress tried again to bring workers of this class within the state workmen's compensation statutes by the so-

called Mills Amendment (Act of June 10, 1922, Chapter 216, 42 Stat. at L. 634; Comp. Stat., § 991 (3)). In *State of Washington* v. *W. C. Dawson & Co.*, 264 U.S. 219 (1923), the law was held to be unconstitutional. There, again, this Court said that such a law, in effect, permitted each state to alter the maritime law, which must be uniform, and that Congress alone had constitutional power to act in this maritime matter. This Court pointed the way for Congress to enact legislation which would be within its constitutional authority (see pp. 227 and 228) and, thereupon, in 1927, Congress did pass the Longshoremen's and Harbor Workers' Act.

During the consideration of the proposed law, there was presented to Congress the history of the foregoing attempts to afford the protection of workmen's compensation to longshoremen. The Congressional intent, in its larger aspect, was stated by Congressman LaGuardia in Volume 68, Congressional Record, 69th Congress, page 5414 (March 2, 1927):

> "Mr. Speaker, it is quite possible to explain the purpose and necessity of this bill in two minutes. About 25 years ago, by reason of the development of commerce and industry, it became imperative to abolish the old common law defenses which could be then interposed in cases for damage accruing from injuries sustained in industry. Since then, workmen's compensation has now been applied to every branch of industry and commerce in the United States. Employers' liability and laws providing compensation have been adopted in every State of the Union. Owing to our dual form of government, we find that longshoremen are employed by companies or individuals in foreign or interstate commerce and therefore there is some question whether or not state law could be made applicable to them. In order to meet that situation, it is necessary to pass a Federal law. This is

what they are doing now. The law simply gives the longshoremen the benefit of up to date legislation to cover injuries sustained in the course of their employment. That is all there is to it. I yield back the minute of my time."

During the pendency of the matter before Congress, not a word was uttered to indicate that Congress was embarking on a legislative program beyond the limited field of compensation, dealing exclusively with employer-employee relationships. It was enacting a *compensation* law, fashioned largely upon that of the State of New York.

The petitioner can find no solace in searching the Congressional Record (Brief, 12, especially footnote 3; Brief, 19-20). Congressman Graham's quoted peroration does not detract from the inescapable conclusion that he, as well as all other legislators, understood the foregoing history of Congressional attempts and understood the Congress was considering nothing beyond a workman's compensation law. His comments on oppressiveness, so far as the employer was concerned, obviously dealt with rates of compensation, rather than the extent of the legal rights being created. What he was actually saying was that the burden of unfortunate industrial accidents should be borne by the industry rather than by the injured workman but at sensible rates of compensation.

Seemingly on the question of Congressional intention, the petitioner says that it will violate the law, to the detriment of injured longshoremen, unless it procures universal immunity from contractual obligations or a sort of judicial amnesty for violating its contracts. (Brief, 18-19)

33 U.S.C.A. 914 (a) provides that "Compensation under this chapter shall be paid periodically, *promptly*, and directly to the person entitled thereto, *without an award*, except where liability to pay compensation is controverted

by the employer." (Emphasis supplied.) The petitioner threatens that if it is liable for common law indemnity, the petitioner and its compensation carrier will violate the law, will no longer pay compensation claims to injured workmen promptly but will insist upon a formal award before they will pay an injured man anything. This would result in an assignment of the injured man's claim against a third party allegedly responsible for having caused the injury. 33 U.S.C.A. 933 (b) The petitioner says that thus the compensation carrier "would have control over any third party action." It is implicit that, having obtained such control, it would not sue the third party and in this way would prevent any question of indemnity as between the third party and the stevedore from ever arising. This devious plan to deprive the injured workman of his rights against a third party could never accomplish that result. The petitioner overlooks the fact that when there is a formal award, the compensation carrier becomes a fiduciary or trustee under the law (33 U.S.C.A. 933 (a), (b), (d), (e)).

Actually, the financial interests of legitimate compensation carriers, as such, are entirely opposed to the petitioner's ideas. When an injured longshoreman recovers damages from a third party, the compensation carrier recoups all payments made in compensation and for medical expenses; its further liability in compensation is diminished by the remaining amount of the recovery (33 U.S.C.A. 933). In the case at bar, the compensation carrier has received from Pan-Atlantic all of the payments which the carrier had made to, or for, Palazzolo. It might be expected to participate with Ryan in the threatened violation of the law in the future only if it has written another kind of insurance for Ryan, whereby it will be obligated to pay the judgment for indemnity against Ryan, in whole or in part. An insurance company having a conflicting financial interest of that type might conceivably be tempted to endeavor to sacrifice the compensation rights

of injured men so that other insurance obligations to others might not have to be paid.

It should reasonably be anticipated that when first an insurance carrier for a stevedore essays the nefarious scheme proposed by the petitioner in violation of the law, the Federal judiciary will brand such conduct fraudulent and take appropriate steps to thwart it. It is certainly difficult to understand an argument which says, in effect, the Congressional intention must have been to exonerate the stevedore from his contractual obligations to a shipowner, because if it had no such intention, the stevedore will violate the Congressional enactment.

The Petitioner really confesses that Congress had no "intention" so far as the case at bar is concerned (Brief, 18), and the reason it had no intention is fairly obvious, in that, the problem of indemnity by contract between shipowner and stevedore is quite foreign to any workmen's compensation statute.[2] So, too, the petitioner confesses by implication that the Act does not apply to contractual arrangements between stevedore and shipowner, when it recognizes that express agreements on this subject are common in the industry. (For example, see *American Stevedores, Inc.* v. *Porello*, 330 U. S. 446.)

Where there is contractual indemnity by express provision, the stevedore does not divest himself of "the aegis of the statute" (Brief, 9). In such cases, the stevedore's obligations are defined, in some instances reducing his liability for common law indemnity, and in others extending his responsibility, but withal, leaving unaffected his statutory obligations to his employees. A stevedore is impotent to alter his obligations to the latter (33

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[2] The problem of constitutional law, which would be involved if Congress intended to destroy a shipowner's contractual rights without giving him anything in return, need not be approached, because the limited purpose of the Act is so apparent.

U.S.C.A. 915). Significant it is that the Act contains no similar provision relating to agreements by a stevedore with those bearing a relation to him *other than that of employee*. One should be amazed if there were such a provision, because, in the final analysis, one must return to the point of departure, namely, Congress passed a *compensation* law. Since the Act does not bar indemnity where the stevedore and a shipowner have literally written indemnity into the contract, the Act cannot reasonably bar indemnity where the contract is silent and the law implies it, or reads it into the contract. The stevedore is no less at fault in one case than the other, and the shipowner is no less aggrieved in either instance.

From the entire Congressional Record, read in the light of history, one must conclude that the legislators who passed this law would be rather amazed to hear it argued that employers buy with their compensation insurance not only the release of all other liability to employees, but, as well, a release of all obligations, by contract or otherwise, to the rest of the world. The petitioner's position is not only opposed to the clear purposes of the statute, but when one realizes that this type of case can arise only because a stevedore fails to do that for which it has been paid, the argument is exposed as unreal, unconscionable and inequitable.

33 U.S.C.A. 905 defines the employer's liability *as an employer* to his employees and those who stand in the shoes of his employees. The statute refers to the employee, his legal representatives, husband, wife, parents, dependents, next of kin, and anyone else claiming *against the employer on account of the injury or death of an employee*. It is difficult to conceive how Congress could have said more clearly that the rights of compensation are the exclusive remedy for an employee, his kin, assignees, subrogees, or anyone else *who claims through him* against one in the status of *employer*.

In the case at bar, Pan-Atlantic has not sued Ryan *as an employer*, nor has any breach of obligation on Ryan's part *as an employer* been asserted, directly or indirectly, as the basis of Pan-Atlantic's right to recover. Pan-Atlantic does not claim *through Palazzolo* by subrogation or otherwise. Pan-Atlantic's claim has been allowed on the age-old basis that having breached its contract with Pan-Atlantic, Ryan should pay damages for that breach.

In its origins this case presented two separate and distinct lines of obligation on the part of Ryan. Because it was an *employer* of Palazzolo, it owed *Palazzolo* the obligation of procuring compensation for him under the Act. Because it was a *contractor* with Pan-Atlantic, it owed *Pan-Atlantic* the legal duty of doing a good, workmanlike job. It is inconceivable that Ryan's satisfaction of its legal duty to Palazzolo under the Act should insulate Ryan from the consequences of breaching its agreement with Pan-Atlantic. One of the reasons why such a conclusion is fundamentally wrong is stated in *Larson, The Law of Workmen's Compensation*, Vol. 2, page 242:

> "* * * The question here becomes very precise: did the compensation acts, in conferring immunity on the employer from common law suits, mean to do so only at the expense of the injured employee, or also at the expense of outsiders? One answer is that the injured employee got *quid pro quo*, in receiving assured compensation payments as a substitute for tort recoveries, while the third party has received absolutely nothing, and hence should not be impliedly held to have given up rights which he had before. It is unfair to pull the third party within the principle of mutual sacrifice when his part is to be all sacrifice and no corresponding gain."

The petitioner attempts to integrate the separate and distinct obligations of (a) Ryan to Palazzolo in Compen-

sation, (b) Ryan to Pan-Atlantic in contract and (c) Pan-Atlantic to Palazzolo, by referring to "hydraheaded" litigation (Brief, 9) and the "conduit" theory (Brief, 20). Neither argument can withstand scrutiny.

The type of litigation characterized as "hydraheaded" is, indeed, common but in no sense is it peculiar to cases involving longshoremen, shipowners and stevedores. It is the aim of modern jurisprudence to abolish multiple trials where they are unnecessary. Rule 14(a) of the Federal Rules of Civil Procedure (printed in the Appendix) is one of general scope and is used in all types of litigation, including contracts and patent infringement. So, too, the 56th Admiralty Rule of this Court (printed in the Appendix) encompasses the whole field of admiralty litigation. In no way is it designed only for litigation between an injured longshoreman and shipowner on the one hand and the latter against stevedore on the other. The liberality of this more modern procedure, which the petitioner seems to frown upon, should be recognized for exactly what it is, namely, procedure and nothing more. Impleader can neither add to nor substract from the *substantive* legal rights of the parties. It is a judicial device to simplify the trial of issues and leaves unaffected the basic rights of the parties to the law suit. The petitioner has obscured the fundamental rights of shipowner and contracting stevedore by a purely adjective matter.

On the whole question, the fundamental issues can be most easily seen if one removes from consideration the procedure commonly referred to as "third-party practice." Let us assume that Palazzolo's action against Pan-Atlantic had not been removed from the New York State court and Pan-Atlantic did not bring Ryan into that litigation by using the practice allowed by Section 193(a) of the New York Civil Practice Act (printed in Appendix). Assume that the case was tried to a jury which found that Palazzolo was injured because the vessel was unseaworthy as

to her stow, the rolls not having been adequately chocked at Georgetown. Who stowed the cargo would be of no interest to Palazzolo or to Pan-Atlantic in that litigation, because the latter has a non-delegable duty to provide a longshoreman with a seaworthy vessel, *Seas Shipping Co. v. Sieracki*, 328 U.S. 85. Assume further that Palazzolo received a judgment for $75,000 in the State court and Pan-Atlantic paid the judgment. Thus there would be brought to final determination the rights which the injured longshoreman had against the shipowner. If the story ended there, Ryan could not even claim to be aggrieved. Indeed, it would be eminently satisfied with the result because it or its compensation carrier would receive from the judgment reimbursement for all sums it had paid as compensation to Palazzolo and all medical expenses incurred (33 U.S.C.A. 933).

The foregoing assumption explodes as utter nonsense the "conduit" theory which underlies so much of the petitioner's argument. Under those circumstances, no one could sensibly urge that Palazzolo had indirectly sued Ryan, his employer, or received anything directly or indirectly from Ryan. This conclusion cannot intelligently be otherwise simply because the story does not end at this point.

Let us assume that after Pan-Atlantic had satisfied Palazzolo's judgment, it then sued Ryan in a Federal court, there being diversity of citizenship, for breach of contract. That action would have nothing to do with Palazzolo, directly or indirectly. Already he would have had the full measure of his rights by the payment of the judgment. In the subsequent litigation between shipowner and stevedore nothing could happen to affect in any way either Palazzolo's rights to recover or the *quantum* of his damage. Once his judgment had been paid, the question of his rights against Ryan for compensation under the Longshoremen's and Harbor Worker's Compensation Act could

not arise, and, it is almost superfluous to point out that, in the first litigation by Palazzolo against Pan-Atlantic, any question of Palazzolo's compensation rights against Ryan would be entirely alien to the issues.

To continue the example, the cause of action for breach of contract would be tried, whether the theory of the complaint was express contract or implied contract. It would be resolved one way or the other in the Federal court litigation. If Pan-Atlantic prevailed and it was found that Ryan did breach its contract properly to stow the cargo, then, Pan-Atlantic would receive damages of $75,000 (and perhaps counsel fees and expenses as well) from Ryan for breaching that contract. Certainly no one could say that Palazzolo had ever sued Ryan directly or indirectly or had obtained any money from Ryan on the theory that Pan-Atlantic was some type of "conduit."

The foregoing example demonstrates the relative rights of the parties and no confusion can be created by any procedural question. All that the third-party practice did in this case was to result in one trial rather than two. While this practice was not required to be followed, it was obviously desirable because Palazzolo's claim against Pan-Atlantic on the one hand and Pan-Atlantic's claim against Ryan on the other had a common question of fact which should only be tried once, namely, was the stow at Georgetown proper and safe?

Looking to the general aspects of petitioner's Point I (Brief, 9-21) one would not suspect that the Court of Appeals for the Second Circuit had a concededly sound basis for decision, making academic any exploration into other fields to support the adjudication. While the Court found indemnification contract (as well as in "tort"—*but not a common tort against Palazzolo*) the petitioner says nothing of contract and has discussed extensively only the law of joint tort feasors.

The petitioner has recited (Brief, 13-16) the so-called "chronological judicial path" in the Second Circuit in the cases of *American Mutual Liability Insurance Co.* v. *Matthews*, 182 F. 2d 322, *Gill* v. *United States*, 184 F. 2d 49; *Slattery* v. *Marra Bros., Inc.*, 186 F. 2d 134; *LoBue* v. *United States*, 188 F. 2d 800 and *Mikkelsen* v. *The Granville*, 101 F. Supp. 566, 191 F. 2d 858. While they are largely unimportant here because of the contract features found by the Court of Appeals, these cases are not mysterious, do not create a "judicial morass" or result in a "welter of confusion."

It is the law of the Second Circuit that (a) if a stevedore-employer and the third-party are legally strangers, *i. e.*, there is no contractual or other recognized legal relation between them, (b) so that the *only* basis for contribution would be that accruing to joint tort feasors and (c) if the stevedore-employer has complied with 33 U.S.C.A. 901, *et seq.*, (d) the third-party may have neither contribution nor indemnity where the stevedore's employee has recovered from the third-party (e) because the stevedore's compliance with the Act makes him incapable of committing a tort against his employee and (f) the stevedore is legally unable to be a tort feasor. In that regard the *A.L.I. Restatement of Restitution* §86 (Brief, 15) is in accord. In short, if the *only* basis for contribution or indemnity under the facts of a given case is a *joint tort feasor* situation and one of the parties is not (and cannot be) a tort feasor, the relief is not granted.

What the petitioner overlooks is that in the very cases cited, the Court of Appeals fully recognizes the limitation of the doctrine as explained hereinbefore, and for a long time has been and is now citing with approval its own adjudications in *Burris* v. *American Chicle Co.*, 120 F. 2d 218 and *Rich* v. *United States*, 177 F. 2d 688; as well as *Westchester Lighting Co.* v. *Westchester Small Estates Corporation*, 278 N. Y. 175 and *United States* v. *Arrow Stevedoring*

Co., 175 F. 2d 329 (9th Cir.). The distinction is not lost in the Eastern or Southern District Courts in the Second Circuit usually. (Record, 31-33 and *Lundberg* v. *Prudential S. S. Corp.*, 102 F. Supp. 115.)

In the cited cases, these courts have recognized the fundamental distinction between two separate and distinct lines of obligation. One line of obligation runs from an employer to his employee, the other separate line of obligation runs from the employer (but not *as an employer*) to the person with whom he is bound by contract, express or implied, to do a good job. The *Westchester Lighting Company* case is interesting, not only because of the dignity and repute of the court which decided it, but, as well, because the New York Workmen's Compensation Law, which was there involved, is the very law upon which the United States Longshoremen's and Harbor Workers' Compensation Act was based.

In the *Westchester Lighting Company* case, the defendant set up in its answer to a claim for indemnity the fact the defendant had secured compensation to its employees, including the injured man who had previously recovered judgment against Westchester Lighting Co. The issue having been tendered to the Court of Appeals of New York by certification of the exact question, that court held that such a defense was no defense in law. The court referred to the provisions of Sections 10 and 11 of the New York Workmen's Compensation Law, which are substantially identical with the provisions of the United States Longshoremen's and Harbor Workers' Compensation Act. So far as the "exclusive liability" portions of the statutes are concerned, they are identical. The Court of Appeals of New York pointed out that the plaintiff's claim for indemnity was not "on account of the employee's death." The plaintiff was simply asserting its own right of recovery for *breach of an independent duty or obligation owed by the defendant to the plaintiff*. The court admitted that if the

defendant was required to respond in damages to the plaintiff, one might say, without analysis, that, in the end result, the employer had been made liable indirectly in an amount which could not have been recovered directly. The invalidity of that position was adjudged by the court because there are two different lines of legal obligation, namely, one running to the employee and the other running to the contractor. Accordingly, when the contractor sues, his action is not based upon any theory of subrogation. The court wrote:

> "An independent duty or obligation owed by the employer to the third-party is a sufficient basis for the action."

The foregoing brief discussion of the law of the Second Circuit and of the State of New York is not intended as a departure from the respondent's main theme under this Point (33 U.S.C.A. 901 *et seq.* has no effect upon respondent's implied contractual rights against Ryan) nor entry into the petitioner's enchanting phantasmagoria of "tort" or of "State law"[3] beyond the necessity of demonstrating the petitioner has resourcefully steered his vessel over turbulent seas, whipped up by created winds of gale force—and this where serene passage lies in the one word "contract."

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[3] At Brief, 21, footnote 6, the petitioner says that while it appreciates the meaning of the Act cannot depend upon what state courts may have held concerning their several and inharmonious compensation statutes, it has created the impression that nine of fourteen state courts have held compliance with their compensation laws to be a bar to a claim for indemnity and five states have not. This has been stated as rounding out "the reservoir of law on this subject." *Analysis shows that not a single case in any state cited by the petitioner has held against the respondent's rights here in implied contract.* Annexed hereto is an appendix discussing by states the case or cases to which the petitioner has referred as expounding the law of that state.

POINT II

No legislation is required to create indemnity, there being a fundamental difference between contribution and indemnity. Pan-Atlantic's claim against Ryan is not a maritime non-collision tort action.

Permeating the petitioner's brief is the thought that Pan-Atlantic's claim against Ryan is based upon a non-collision maritime tort (*e. g.*, Brief, 21, 23, 24, where such words appear as "maritime non-collision tort action," "substantive right in the maritime law," "implied in the maritime law"). When Pan-Atlantic's claim against Ryan is considered in its obvious contractual aspects, the claim may be expressed as one for breach of contract. There is nothing peculiarly maritime requiring the further development or application of admiralty concepts to such a claim.

It is true that the claim of Palazzolo against Pan-Atlantic was a maritime matter, but the event which gives rise to the indemnitor's obligation to the indemnitee is only of historical interest and does not transform an ordinary breach of contract action into one for a maritime tort. The distinction between the two situations has been extensively discussed hereinbefore. As to the alleged "maritime" aspects of Pan-Atlantic's contractual right of indemnity, this case does not differ in essence from one where the shipowner had been sued for cargo damage resulting from the improper stow by Ryan. The claim by cargo interests would be maritime in character. Having suffered damage by payment of the cargo claims, Pan-Atlantic's contractual rights against Ryan would be apparent and a suit to collect damages from Ryan under the contract would obviously not be to recover for a maritime tort. The nature of the cargo claim would not alter the contractual character of the claim for indemnity or translate rights in contract into the realm of tort. No principles

peculiar to maritime law would be involved in the contract action.[4]

The rules of law emerge from the cases with clarity only if it is recognized that there is a fundamental, basic difference between the legal concepts of contribution and indemnity. While they are both equitable doctrines, in some cases their legal bases are different. Contribution is an equitable rule which can be applied only where the rights of the parties are founded in tort, because contribution is a giving in common with others where all of the defendants owe a duty to the plaintiff. On the other hand, since indemnity is a making good or securing of another's loss, it may be bottomed either in tort or contract. The distinction is vital. *Larson, The Law of Workmen's Compensation*, Vol. 2, Sec. 76, pp. 227, 228. The rhetorical quotations by the petitioner, such as indemnity is "an extreme form of contribution," "full contribution," actually cannot support the petitioner's position that there is no difference in the two theories of contribution and indemnity, except a difference in the *quantum* of recovery. When a comparative is used as the major premise of a syllogism, peculiar conclusions of this type are common.

When it is considered that contribution can apply only between joint tort-feasors, the scope of *Halcyon Lines, et al.* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, is clear. In that case, a longshoreman had been injured by the concurrent, or joint, negligence of the shipowner and his stevedore employer. This Court pointed out that courts exercising a common law jurisdiction generally feel that they cannot create rights of contribution between joint tort-feasors simply on their own initiative. This Court held it had never been admiralty doctrine that there should be contribution between mutual wrongdoers, except in collision cases. In the *Halcyon* case, in effect, this

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[4] *Sacramento Navigation Company* v. *Salz*, 273 U. S. 326.

Court was asked to create a substantive right based upon a maritime tort. This Court refused, saying in substance that the remedy was to be found in the legislative field rather than in the judicial. There was nothing in the opinion dealing, directly or indirectly, with the contractual rights of indemnity between shipowner and stevedore. It might be urged that there is always a contractual arrangement between shipowner and stevedore. This is not factual, *e. g.*, cases where cargo is loaded or discharged by the shipper or consignee, or cases where a time charterer makes the arrangements with the stevedore, or cases where a voyage charterer makes such arrangements.

When one comes to a consideration of indemnity for breach of contract, it is clear the respondent is not seeking to have the judiciary create new rights which have not previously existed in the law. Such rights have been recognized by this Court as far back as *Washington Gas Light Co.* v. *District of Columbia*, 161 U.S. 316. There the Gaslight Company was under an obligation to maintain in good order a certain gas box imbedded in a sidewalk in the District of Columbia. The gas box was out of repair. One Parker stepped into it and was injured. Parker sued the District of Columbia on the theory that a municipal corporation is liable for damages sustained by an individual when caused by an obstruction or defect in a public thoroughfare. Parker had his recovery, and then the District of Columbia sued the Washington Gaslight Co. for indemnity, seeking therein to recover the full amount of the judgment which Parker had recovered against the District. This Court held that the District of Columbia did have a right of recovery on general and well-recognized common law principles. The Court did not then create any new rule of substantive law, as it was requested to do in *Halcyon Lines, et al.* v. *Haenn Ship Ceiling & Refitting Corp., supra*.

In discussing the fundamental legal principles existing well over 50 years ago, the Court said in the *Washington*

Gas Light Co. case, at pages 327, 328, that the common law right of indemnity being there applied was of general application and in no way was peculiar to municipal corporations. Previous to that time, this right of common law indemnity had been applied to cases involving public piers, the right of a property owner to recover damages which he had been compelled to pay for a defective wire attached by a company to the chimney of his house, to the right of a master to recover damages which he had been obliged to pay because of a servant's misconduct, and even at that comparatively early date this Court said: "Indeed, the cases which illustrate the rule and its application to many conditions of fact are too numerous for citation and are collected in the textbooks." Analysis of the factual situations to which this Court referred in the *Washington Gas Light* case demonstrates, beyond all question, that the common law right of indemnity then existing was based in some cases upon tort and in others upon breach of contract. The difference between indemnity and contribution is therein manifest.

The petitioner has inverted the obligations of shipowner and stevedore, urging that shipowners should go to Congress for relief whereas, in truth, if further Congressional action is desirable, it is the stevedore who should seek it. The petitioner is here endeavoring to remove stevedores from that liability in contract, express or implied, which all other contractors have. The respondent asks that existing law be applied to this case, while the petitioner is looking for an exception in favor of one particular class of persons. The petitioner does not even attempt to assign any reason, in justice or equity, why the stevedore should be in a preferred, or different, position from the contractors in cases such as *Burris* v. *American Chicle Company*, 120 F. 2d 218; and *Westchester Lighting Co.* v. *Westchester Small Estates Corporation*, 278 N. Y. 1[illegible].

The common law principle of indemnity which has heretofore been of general application, has nothing in its origins or development making it inequitable when applied to a stevedore. The core of the matter is discovered when one considers that the basis of indemnity in this case, or in any comparable case, is not any maritime tort at all. It is purely accidental and without legal significance that the cause which originally gave rise to the *indemnitee's* obligation to an injured person, is some event aboard a vessel, rather than an occurrence on a pier, or in a building, or on a public thoroughfare, or in a means of conveyance on land. The essence of the claim for indemnity is the breach of the obligation owed by the *indemnitor* to him who seeks the indemnity, and there is nothing peculiarly maritime or requiring the application of admiralty principles in that situation.

Far from there being any reason why the principles of indemnity should not apply to a stevedore, there is every reason to apply the rules of common law indemnity with undiminished vigor. Where a stevedore loads cargo improperly, (which is a direct breach of his undertaking, express or implied, to do a good job), he casts upon the shipowner absolute liability, whereby the injured person is not required to show any fault on the part of the shipowner. This Court said of unseaworthiness in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85:

> "It is essentially a species of liability without fault, analogous to other well-known instances in our law. Derived from and shaped to meet the hazards which performing the services impose, the liability is neither limited by conceptions of negligence nor contractual in character. * * * It is a form of absolute duty owing to all within the range of its humanitarian policy."

In a case such as the one at bar, the essential fairness of applying the general rule to a stevedore may be seen.

Where a stow of this character is created, the utmost diligence on the part of a shipowner would not, and could not, detect that the job was done improperly. As each roll was put in place, it automatically hid the manner of chocking of the roll behind it, and when the bottom layer was in place, no one in the world could tell how the rolls were chocked, or even if they were chocked. In any event, *as between shipowner and stevedore*; (not as between shipowner and injured person), it is difficult to see how the stevedore can fairly insist that the shipowner is required to use the utmost diligence to see that the stevedore does that good job for which the stevedore has been hired and paid.

On the question of general maritime law and the petitioner's views casting the indemnity rights into the admiralty field, this Court is not here called upon to vary or destroy the interpretation of the maritime statutes referred to in *Halcyon Lines, et al. v. Haenn Ship Ceiling & Refitting Corp., supra.* The Harter Act (46 U.S.C.A. §§ 190-195) governs the relationship between shipowner and cargo interests. The Limited Liability Act (46 U.S.C.A. § 181, *et. seq.*) relates to the shipowner's rights and obligations against the world under the circumstances therein stated. The Public Vessels Act (46 U.S.C.A. §§ 781-790) covers the obligations of the United States of America in the maritime field so far as it places the United States in the same position as private vessel owners and operators. The Jones Act (46 U.S.C.A. § 688) governs the employer-employee relation of shipowner or operator and crew. The U. S. Longsoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. 901, *et seq.*) controls the employer-employee relationship between stevedore and longshoreman. There is nothing in any of these statutes which purports, directly or indirectly, to have any effect upon the common law right of indemnity in favor of a shipowner against a stevedore, and the application of the rule of indemnity in no way upsets, or tends to vary, the integration of the

statutes. The administration of all of these Acts a an integral whole was not affected by this Court's adjudication that persons covered by the U.S. Longshoremen's and Harbor Workers' Compensation Act have a right against the shipowner for furnishing an unseaworthy vessel (*Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85; *Pope & Talbot, Inc.* v. *Hawn et al.*, 346 U.S. 406; and *Alaska Steamship Co. Inc.* v. *Petterson*, 347 U.S. 396). So, too, the rights of a shipowner vis-a-vis stevedore in common law indemnity can have no effect whatever upon the function of maritime laws as parts of one integral scheme. The rights of each affected class under the foregoing statutes remain as they were before.[5]

In similar vein, it is doubtful that the possible conflicting interests of various groups, to which this Court referred in the *Waterman Lines* case, exist here. It is highly questionable that stevedores, as a group, desire this Court to alter the existing rule of law concerning indemnity. The question is usually resolved by contract between shipowner and stevedore, and it is implicit in what the petitioner has written that it is commonly the practice of the stevedore specifically to undertake indemnity by express contract provision. It is only in the odd case, where shipowner and stevedore are not dealing at arm's length, that the problem must be resolved by implied, rather than express, contract. No reason is assigned why an exception to the general rule of commercial practice should be carved out by this Court under such circumstances.

In order to give the case peculiarly maritime flavor,[5] the petitioner has urged (Brief, 22-23) that if this right of indemnity were presented to an admiralty court, it might not have jurisdiction. There are five answers to the argu-

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[5] Of course, the stevedoring contract is maritime in character but there is nothing unique in the law relating to implied contracts in the maritime law. See, *Sacramento Navigation Company* v. *Salz*, 273 U. S. 326, 329.

ment: First, this claim was presented at law, not in admiralty; second, indemnity is not exclusively a quasi-contractual right; third, the forum in which rights may be asserted in no way alters substantive law (*Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406). Also, for example, prior to 1948, when 46 U.S.C.A. 740 was enacted, the admiralty courts had no jurisdiction of a pier owner's claim based on damage negligently caused by a vessel; but this had no effect on the substantive rights of the pier owner who could proceed at law (*Turner Terminal Company* v. *U.S.*, 93 F. Supp. 441). Fourth, *Robinson* on *Admiralty*, 1939 *Edition*, page 197, *et seq.*, which the petitioner cites to support its conjecture, actually demonstrates the likelihood of admiralty jurisdiction. Of *Krauss Bros. Lumber Co.* v. *Dimon S. S. Corp.*, 290 U.S. 117, the author has said, "The opinion is concerned largely with the lien point. But it seems necessarily to hold that the quasi-contract claim on which the lien rested was itself within the admiralty jurisdiction." Fifth, this Court held there is jurisdiction in an admiralty court. *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446.

Finally, in Point II (Brief, 23), the petitioner returns to its principal theme in Point I and repeats the argument that a stevedore who has complied with the U.S. Longshoremen's and Harbor Workers' Compensation Act cannot be subject to a tort claim by his employee. Whether the effect of the Act is to destroy the substantive possibility of tort, or is to abolish the remedy, need not be decided. Suffice it to say, that the tort issue urged by the petitioner under this Point is just as inapposite as under Point I. Again, the respondent points to the contractual relationship between Pan-Atlantic and Ryan, upon the basis of which the Court of Appeals for the Second Circuit has rightly adjudged the cause.

POINT III

The United States Court of Appeals did not make findings of fact different from the Trial Court.

While the writ of certiorari in this case has not been limited by the Court to a consideration of any particular problem presented in the petition, counsel for the respondent have doubted the writ was issued to review the evidence (see Opinion of Mr. Justice Frankfurter in *McAllister v. United States of America*, U.S. ; 75 S. Ct. 6). However, the petitioner has urged (Brief, 25-32) that there were some serious disputes of fact at the trial and has quoted various parts of the testimony. Accordingly, it is deemed necessary for the respondent generally to review the trial and, particularly, the Trial Court's charge to the jury, in order that the bases upon which the Court of Appeals for the Second Circuit reversed on the law and not the facts may be apparent.

When all of the pleadings, interrogatories, motions, testimony at the trial, Judge's charge—in short, when the whole record is studied—it is seen that the matter between Palazzolo and Pan-Atlantic was reduced to an issue simply stated. The one and only basic fact issue in the case was the propriety of the cargo stow at Georgetown. There never was any dispute of any fact between Pan-Atlantic and Ryan. The sole contest at the trial was between Pan-Atlantic and Palazzolo on this question of whether the stow was proper. If the jury found the stow to be good, Palazzolo's case would have fallen. The jury's verdict for Palazzolo established that the stow was not proper. Ryan has admitted throughout that it had, in fact, created the stow, and consequently, the ultimate issue between Pan-Atlantic and Ryan for decision by the Trial Judge was one of law, namely: Under the facts as established was Pan-Atlantic entitled to indemnity from Ryan.

In arriving at his conclusion, the Trial Judge failed to appreciate the impact of his charge to the jury. This

charge was permeated with the concept of unseaworthiness. The idea of unseaworthiness, as expressed by the Trial Court, was so interwoven with the idea of negligence that the two concepts were inseparable (Record, 290, 291, 292). Because unseaworthiness is a type of liability without fault (*Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85), and negligence is synonymous with fault, it is frequently difficult for one to attempt a unitary concept of the two inconsistent theories. On occasions the difference between them may be vital, *e. g.*, *Mahnick* v. *Southern S. S. Co.*, 321 U.S. 96. But it frequently happens, and such is the case at bar, that the same facts may result in a holding of both negligence and unseaworthiness. No one could challenge the conclusion that if the stowage of the cargo at Georgetown was improper, then automatically the vessel was unseaworthy as to her stow. Having intermingled these two theories of negligence and unseaworthiness in charging the jury, the Trial Judge changed the rules when it came time for him to decide the separate rights of Pan-Atlantic against Ryan and meticulously separated the two theories. He reached the legal conclusion that the parties were joint tort-feasors, *overlooking completely the contract between Pan-Atlantic and Ryan.* He did not seem to understand that Ryan was not charged in the case with having committed any tort against Palazzolo. The Trial Judge did misconceive, misinterpret, and in his opinion did misstate, the legal position taken by Pan-Atlantic. With the facts established beyond all question, the Court of Appeals corrected the legal error committed by the Trial Court. *Spaulding* v. *Parry Navigation Co.*, 187 F. 2d 257, cert. den. 342 U. S. 918; *Kell* v. *Gross*, 171 F. 2d 715, cert. den. 338 U.S. 815.

The Court of Appeals found support for Pan-Atlantic's right of indemnity on two separate bases. One base might be called indemnity arising out of tort, and the other indemnity arising out of contract. When the Court said, "We think the improper stowage the primary and active

cause of the accident", it made no new finding or inference of causation different from the Trial Court. It was the *only* ground of recovery asserted by Palazzolo, and the only basis upon which his claim could possibly have been supported. The words "sole", "active", "primary", "secondary", need cause no concern here, since one of the bases supporting the decision of the Court of Appeals is so unimpeachable that the petitioner has never discussed it. There is not a word in the petitioner's brief concerning two sentences in the Opinion of the Court of Appeals (Record, 327) which rendered really moot all questions of tort, tort feasors, etc. These were:

> "Ryan was obligated by implied contract to perform the work in a reasonably safe manner. This duty Ryan breached; accordingly, Pan-Atlantic is entitled to indemnity."

Therein is the key to the arch. When one considers the contractual phases of the case, the petitioner's fundamental position falls.

Since it must—the evidence being uncontradicted—Ryan admits:

1. It had a contract with Pan-Atlantic properly to stow the cargo at Georgetown.
2. It did not perform its work under the contract in a reasonably proper manner;
3. Palazzolo was hurt because of the improper stowage of the cargo;
4. Pan-Atlantic has been compelled to pay $75,000 to Palazzolo.

In short, Ryan admits it breached its contract and takes the unconscionable position that, despite such fact, it is

not liable for breach of its contract and Pan-Atlantic can have no recovery because of some theories governing the law of torts.

Ryan's position here is not only untenable because it misconceives the nature of Pan-Atlantic's claim (for example, at Brief, 32, reference is made to "a personal injury action"), but also because it is opposed to the public interest. The solicitude of this Court for the welfare of maritime workers is traditional. The decision of the Court of Appeals in this case has placed the ultimate responsibility on the stevedore, who is best situated as a matter of fact to remedy the conditions which caused Palazzolo's injury, and which often cause injury to other longshoremen. If Ryan had done that good job which it was hired and paid to do, this case never would have arisen.

It is certainly the desire of the whole judiciary that the conditions under which longshoremen perform their hazardous work should be as safe as can humanly be achieved. The stevedore controls the conditions under which his longshoremen work. Stevedores are specialists and theirs is the opportunity to say whether conditions are reasonably safe or not; whether their men should work under the circumstances, or what additional safeguards may be required, so that their longshoremen may perform their tasks in reasonable safety. Because the stevedore is a specialist in the loading and discharging of cargo, this type of work is done by stevedoring companies, rather than by the ship's personnel. It is an enlightened policy, which imposes upon the stevedore the ultimate responsibility for doing a poor job, because it is the stevedore's primary right, privilege and opportunity to correct those conditions which lead to the injury of workmen. When companies of this type finally conclude that the law is meaningful when it places the primary obligation on the stevedore to furnish the men with a safe place to work, then the "hands-off" attitude of the petitioner, and others

similarly situated, will disappear. It is a reasonable conclusion therefrom that accidents of this character will diminish in frequency.

Underlying the entire discussion in petitioner's brief, Point III, is the thought that a stevedore has no obligation of any kind to see to it that longshoremen work in conditions of safety. It really urges that the burden is on the shipowner to see that the stevedore, who has been hired to do a good job, must, at the shipowner's peril, use great diligence to see that the stevedore does the good work for which it has been hired and paid. As a corollary of that fallacious premise is the thought that Ryan was only a bystander, totally aloof to a point where one must question how the cargo ever did become stowed, and, at Brief, 32, Ryan endeavors to support the role of innocent bystander by urging that Pan-Atlantic furnished defective or improper gear to Ryan. The only, and undisputed, proof in the Record is exactly the opposite, namely, there were proper chocks both aboard the vessel and on the dock at Georgetown, where the cargo was lifted (Record, 236). The Court of Appeals for the Second Circuit was not misled by the innocent role which the petitioner has assumed.

For the reasons indicated previously, and particularly because of the contractual phases of this case, the decision of this Court in *McAllister* v. *United States of America* (U.S. ; 72 S. Ct. 6), referred to at page 32 of the petitioner's brief, is not apposite. In that case, an admiralty judge had concluded on the basis of the facts and the opinion of experts, that there was a connection between the respondent's negligence and the libelant's contracting polio. The Court of Appeals felt no proximate cause had been shown and that the matter was purely conjectural. This Court held that upon the balance of the probabilities it did seem a reasonable inference for the Judge to have drawn that there was a causal connection, and therefore

one could not properly say that the inference of causation was clearly erroneous.

When one looks at the case at bar, through the eyes of contract, all questions of inference, causation, and the quality of tortious conduct disappear.

CONCLUSION

The judgment in the court below being in accord with existing law and having achieved justice between the parties, should be affirmed.

Respectfully submitted,

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APPENDIX

Consideration of State Workmen's Compensation Statutes referred to in Appendix to petitioner's brief.

CALIFORNIA: The petitioner admits that the interpretation of Sec. 3601 of the Labor Code of California in *Baugh* v. *Rogers*, 24 Calif. 2d 200, is opposed to its position here.

COLORADO: *Ward* v. *Denver & R.G.W.R. Co.*, 119 F. Supp. 112.

This Federal Court recognized that there were no adjudications in the Colorado state courts interpreting Sec. 292 of Chapter 97 of the Colorado Statutes Annotated. The court felt that the Colorado Statute was broader in scope than the State Statutes of North Carolina and New Jersey which seemed to immunize the employer. There was nothing in the relationship between the third-party defendant and the original defendant which would support a breach of contract theory.

IOWA: The petitioner admits that *American District Telegraph Co.* v. *Kittleson*, 179 F. 2d 946, interpreting Sec. 85.20 of the Iowa Code Annotated, is opposed to the petitioner's position.

MARYLAND: *Baltimore Transit Co.* v. *State, to Use of Schriefer, et al.*, 183 Md. 674, 39 Atl. 2d 858.

Schriefer, an employee of the City of Baltimore, was killed in the course of his employment and the city made payment of compensation to Schriefer's dependents under an award of the State Industrial Action Commission. At the time of the accident, Schriefer, an employee of the street cleaning department, was riding on a truck owned by one Bauernfeind and operated by her chauffeur, one Bivens, under contract with the city to collect ashes. The

truck was struck by a street car owned by the transit company. Using rights of subrogation, the State sued the transit company and Bauernfeind. The transit company procured an order making the city a third-party defendant. The theory of the third-party claim was that the accident was due solely to the negligence of the city's agent and liability was claimed under the Joint Tort Feasors' Act of Maryland. The court held that the right of contribution is a derivative right and is only applicable under Maryland law "where there is a common liability to an injured person in tort." The court found further difficulty in the Uniform Contribution Act because of procedural difficulties "due to the lack of a comprehensive third-party practice act." Obviously, the only relation among the defendants was that of tort feasors, there being no contractual undertaking between or among them.

MINNESOTA: The petitioner admits that *Lunderberg* v. *Bierman*, 63 N.W. 2d, 355, interpreting Sec. 176.031 of Minnesota Statutes Annotated, is opposed to the petitioner's position.

NEW JERSEY: *Slattery* v. *Marra Bros., Inc.*, 186 F. 2d 134.

In this case, a Federal Court referred to Section 34:15-8 of the New Jersey Statutes Annotated. Marra Bros., Inc. was the lessee of the pier on which the plaintiff, an employee of Spencer, was injured. Spencer had procured compensation for its employees and the question was whether Marra might have indemnity from Spencer. The Court said, "However, in the case at bar, not only was the Spencer Co. not liable to Slattery, but it had no contract with Marra Bros., Inc. or any other legal relation with it except that of joint tort feasor." The Court recognized that the right of indemnity could come from contract, as in *Burris* v. *American Chicle Co.*, 120 F. 2d 218 and *Rich* v.

United States, 177 F. 2d 688, or tort, as in *Westchester Lighting Co.* v. *Westchester Small Estates Corp.*, 278 N. Y. 175.

NEW YORK: The petitioner admits that *Westchester Lighting Co.* v. *Westchester County Small Estates Corporation*, 278 N. Y. 175, interpreting Sec. 11 of the New York Workmen's Compensation Law is opposed to the petitioner's position.

NORTH CAROLINA: *Brown* v. *Southern Ry. Co.*, 202 No. *Carolina* 256, 162 S. E. 613.

The case stands for the proposition that under the Workmen's Compensation Act of North Carolina, there can be no contribution among joint tort feasors where one of the alleged tort feasors is an employer who has procured compensation and there is no contractual relationship between the alleged tort feasors.

Hoover v. *Globe Indemnity Co.*, 202 No. Carolina 655, 163 S. E. 758.

A man, being injured in the course of his employment, died as the result of alleged malpractice. The court held that malpractice is not an independent ground for action under North Carolina laws, falls within the scope of the Workmen's Compensation Law and, therefore, the employee and his representative can only proceed under compensation law.

Essick v. *City of Lexington*, 232 No. Carolina 200, 60 S. E. 2d 106.

It was admitted that the defendants who brought in the additional defendants had no right under North Carolina law to obtain contribution as joint tort feasors. The court

referred to the law permitting a party sued in negligence to plead in partial bar of recovery, the negligence of the employer in producing the injury.

Lovette v. *Lloyd*, 236 No. Carolina 663, 73 S. E. 2d 886.

It does not appear that there was any contractual relationship between the original defendant and the third-party defendants but, in any event, the provisions of the Workmen's Compensation Act of North Carolina are entirely too different to be compared. Indeed, under that law, where an employee is injured by the negligence of a third-party and his employer, the third-party may plead and prove the concurring negligence of the employer as a bar, *pro tanto*, to the recovery of the compensation paid or payable by the employer.

Hunsucker v. *High Point Bending & Chair Co.*, 237 No. Carolina 559, 75 S. E. 2d 768.

This opinion points up the very distinctions urged by the respondent in the case at bar. In the first place, the court did find that the total of North Carolina statutes was not entirely harsh on a third party, in that, his liability to an injured employee was reduced to the extent of workmen's compensation received. It said, "Much confusion is avoided if constant heed is paid to the significant and simple circumstances that the employer, *i. e.*, Herman-Sipe, had no contract with the appellant or any other legal relation with it except that of joint tort feasor." The court fully understood that where a third party has an independent right to call upon the employer for indemnity because of contract, such indemnity may be had regardless of compensation laws. The court discussed extensively the cases of *Westchester Lighting Co.* v. *Westchester County Small Estates Corporation*, 278 N. Y. 175; *Burris* v. *American Chicle Co.*, 120 F. 2d 218; *McFall* v. *Compagnie Maritime*

Belge, 304 N. Y. 314, and *Rich* v. *United States*, 177 F. 2d 688. Of them, the Court wrote:

> "He was required to indemnify the third party for damages paid to an injured employee because he had breached his independent contractual duty to the third party to perform the work with due care."

OHIO: In *Bankers Indemnity Insurance Company* v. *Cleveland Hardware & Forging Co.*, 77 Ohio App. 121, 62 N. E. 2d 180, the entire decision was based upon factors other than contractual matters. In that case, the plaintiff insured Burdett Oxygen Company against loss through negligence. The defendant, Cleveland Hardware, claimed it ordered nitrogen gas from Burdett, but Burdett delivered oxygen instead and an explosion occurred, killing three of Cleveland Hardware's employees. Cleveland Hardware paid compensation to the dependents of its deceased employees, and after these dependents sued Burdett Oxygen, claiming negligence in delivery of the gas. The plaintiff insurance carrier of Burdett concluded that the primary fault was that of Burdett and any negligence of Cleveland Hardware was secondary. The Insurance Company compromised the action and then sued for the full amount it had thus paid.

The plaintiff did not plead any theory that the Hardware Company was primarily liable and the Oxygen Company secondarily liable. The Court recognized that where there is primary and secondary liability the wrongdoers are not joint tort feasors and the one secondarily liable may recoup his loss "from the one who actually created the danger." As to the compensation phases of the case, the Court said that the Ohio constitutional provisions are entirely different from those in the New York Compensation Law (upon which the U. S. Longshoremen's and Harbor Workers' Compensation Law was based) and that

under the Ohio Constitution an employer complying is relieved from "all common law liability."

OKLAHOMA:- In *Peak Drilling Co.* v. *Halliburton Oil Well Cement Co.*, 215 F. 2d 368, the Federal Court could find nothing in the state courts of Oklahoma dealing with Section 12 of Title 85 of Oklahoma Statutes Annotated. There was no contractual relationship between the defendant and the third-party defendant, and under Oklahoma law there is no right of contribution or indemnity where the parties are joint tort feasors. The original defendant alleged a contract implied by law as grounds for indemnity "but the pleadings do not allege an independent legal relationship from which a contract can be implied. Indeed, they do not create any legal relationship from which a duty arises from Halliburton to Peak. Both Peak and Halliburton were independent contractors to Sinclair there was no contractual relationship between them. Of course, each owed the other the duty to exercise ordinary care, but there is no allegation of a breach of that duty and there is therefore no legal basis for indemnity." The court was definite in its views that it was not placing itself as opposed to *Burris* v. *American Chicle Co.*, 120 F. 2d 218; *Westchester Lighting Co.* v. *Westchester County Small Estate Corporation*, 278 N. Y. 175, or *Rich* v. *United States*; 177 F. 2d 688, pointing out again that there was no contractual or legal relationship between the parties before the court giving rise to an enforceable duty which would sustain the right of indemnity against the employer as found in the cited cases.

PENNSYLVANIA: *Maio* v. *Fahs*, 339 Pa. 180, 14 Atl. 2d 105.

As the petitioner recognizes, the Pennsylvania law is quite different from 33 U.S.C.A. 901, *et seq:* but the adjudication actually is of no help to the petitioner. While the

plaintiff's husband, one Sell, was employed as a helper on a milk truck operated by Turner, the vehicle came in collision with the tractor operated by Fahs and was killed. The plaintiff sued Fahs to recover for wrongful death and the latter brought in Turner and the driver of the truck, Chatburn. The plaintiff had a judgment jointly against all defendants. The court agreed there was evidence to justify a finding of fault on the part of both drivers. Turner urged that the plaintiff's exclusive rights against it were under the Pennsylvania Workmen's Compensation Act of June 2, 1915, P. L. 736, 77 P. S. Par. 1, *et seq.* The court held that the Act of June 24, 1939, P. L. 1075 permitted contribution among those jointly or severally liable for a tort where their liabilities are all primary or are all secondary. The court held that if the defendants, other than Turner, the employer, paid the judgment, they did have a right to receive contribution from Turner to the extent of his liability under the compensation law. Additionally, if the plaintiff received anything in compensation from Turner, such amount would be deducted from the amount which the other defendants would be required to pay the plaintiff.

Rhode Island: The petitioner admits that *Whitmarsh* v. *Durastone Co.*, 122 F. Supp. 806, interpreting Chapter 300, Art. 1, Sec. 6 of the Rhode Island General Laws, is opposed to the petitioner's position.

South Carolina: In *Burns* v. *Carolina Power & Light Co.*, 88 F. Supp. 769, aff'd 193 F. 2d 525, the Federal Court agreed that there are no decisions of the state courts in South Carolina adjudging the effect of Sec. 72-401 of the Code of Laws of South Carolina, 1952. Further, the Federal Court's opinion on this subject was admittedly *obiter dictum*, for its discussion began with the words,

"If it were necessary to decide definitely the law of South Carolina regarding these matters * * *." Actually, the court held that, under the allegations of both the original and the third-party complaints, the original defendant and the third-party defendant could be nothing but joint tort feasors. There was no contractual arrangement, express or implied, between the parties.

WISCONSIN: *Britt* v. *Wolff*, 201 Wis. 533, 230 N. W. 621.

Britt was a passenger in a car driven by Buggs. It was in collision with a car driven by Wolff. Britt being an employee of Buggs, the latter assigned any claim which he might have to Britt against Wolff. Britt sued Wolff for damages. Wolff filed a cross-complaint against Buggs alleging that Buggs had been equally guilty of negligence. This case stands for the proposition that, where two strangers have jointly injured a person, there may be no contribution between the tort feasors where one of them has been an employee of the plaintiff and has procured the payment of compensation.

In *Guse* v. *A. O. Smith Corp.*, 260 Wis. 403, 51 N. W. 2d 24, the section of the Wisconsin law involved had nothing to do with anything like 33 U.S.C.A. 905. The plaintiff's wife had been injured in the course of her employment and had received workmen's compensation provided in Chapter 102 of the Wisconsin statutes. Her husband sued for loss of consortium. The court specifically recognized that the Wisconsin statute is entirely different from 33 U.S.C.A. 901, *et seq.* so that anything it wrote would be inapposite. The court recognized that there is a great conflict of state decisions on the question of whether a husband or a wife can maintain an action against an employer for loss of consortium as a result of the injury.

Rule 14(a) of the Federal Rules of Civil Procedure is as follows:

"When defendant may bring in third party. Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counter claims and cross-claims as provided in Rule 13. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant."

The 56th Admiralty Rule of the Admiralty Rules of Practice of this Court provides as follows:

"56. Right to bring in party jointly liable.—In any suit, whether in rem or in personam, the claimant or respondent (as the case may be) shall be entitled to bring in any other vessel or person (individual or corporation) who may be partly or wholly liable either to the libellant or to such claimant or respondent by way of remedy over, contribution or otherwise, growing out of the same matter. This shall be done by petition, on oath, presented before or at the time of answering the libel, or at any later time during the progress of the cause that the court may allow. Such petition shall contain suitable allegations showing such liability, and the particulars thereof, and that such other vessel, or person ought to be proceeded against in the same suit for such damage, and shall pray that process be issued against such vessel or person to that end. Thereupon such process shall issue, and if duly served, such suit shall proceed as if such vessel or person had been originally proceeded against; the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain. But every such petitioner shall, upon filing his petition, give a stipulation, with sufficient sureties, or an approved corporate surety, to pay the libellant and to any claimant or any new party brought in by virtue of such process, all such costs, damages, and expenses as shall be awarded against the petitioner by the court on the final decree, whether rendered in the original or appellate court; and any such claimant or new party shall give the

same bonds or stipulations which are required in the like cases from parties brought in under process issued on the prayer of a libellant."

Section 193(a) of the New York Civil Practice Act provides as follows:

"§ 193-a. Third-party practice. 1. After the service of his answer, a defendant may bring in a person not a party to the action, who is or may be liable to him for all or part of the plaintiff's claim against him, by serving as a third-party plaintiff upon such person a summons and copy of a verified complaint. The claim against such person, hereinafter called the third-party defendant, must be related to the main action by a question of law or fact common to both controversies, but need not rest upon the same cause of action or the same ground as the claim asserted against the third-party plaintiff.

2. The third-party defendant may answer the claim asserted against him and serve copies of his answer upon the third-party plaintiff's attorney and the plaintiff's attorney within twenty days after the service of the summons and copy of the third-party complaint, so that the claims of all parties may be determined in the action, which shall proceed to such judgment or judgments as may be proper. In his answer the third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. For the purpose of contesting plaintiff's claim against the third-party plaintiff, the third-party defendant shall have the rights of a party adverse to the plaintiff, including the right to appeal.

* * * * *"